IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

JUDGMENT

(1) SUNITA SHARMA VS. STATE OF RAJASTHAN & ORS.

(D.B.C.Writ Petition (PIL)No.2393/03)

(2) SUNITA SHARMA VS. STATE OF RAJASTHAN & ORS.

(D.B.C.Writ Petition No.746/03)

Date of Judgment :- 8th August, 2006.

PRESENT

HON'BLE THE CHIEF JUSTICE SHRI S.N.JHA
HON'BLE JUSTICE SHRI MOHAMMAD RAFIQ

Mr.Bheem Arora, for the petitioner.
Mr.M.R.Singhvi, for the respondent no.3.
Mr.K.N.Joshi, for the respondents no. 4 and 5.
Mr.Rameshwar Dave, Dy.G.A. for the State.

BY THE COURT:(PER HON'BLE MOHAMMAD RAFIQ,J.)

Since both the aforesaid writ petitions styled as Public Interest Litigation have been filed at the instance of one person which pertain to violation of municipal laws in raising construction of one and the same commercial complex, they were taken up together for hearing and therefore are being decided by a common judgment.

The petitioner Smt.Sunita Sharma in writ petition No. 746/03 has alleged that the office bearers of the Municipal Board,Sujangarh(for short “the Board”) in connivance with respondent no.3 Shri Birdhi Chand

caused a huge loss amounting to around Rs.6 lacs to the coffers of the Board by not realizing conversion charges for land use from residential to commercial in accordance with law as also by compounding of established offences under the Rajasthan Municipalities (Compounding and Compromising of Offences)Rules, 1966 (for short “the Rules of 1966”) . The petitioner alleged that even though the Board had granted permission to the respondent no.3 to raise construction of 20 shops only on the ground floor but he instead dug out a huge basement apart from raising construction on first as well as second floor. Not only this, the respondent no. 3 has encroached upon public land measuring 4'x48' ft. and violated the conditions of the permission by not leaving a strip of 40 ft. open in the front from centre of the road. When the petitioner made a complaint about the same, the Executive Officer of the Municipal Board directed the Junior Engineer to make inspection of the site and submit report, who on 2nd November,2002 submitted his report along with site map stating therein that the respondent no.3 has violated the condition of permission and has raised unauthorised construction of basement, first floor and second floor and work at the second floor was still in progress. Instead of leaving 40 ft. open land from the centre of the road , the respondent no.3 has left only 32'2” of area land open. While permission was granted to raise construction over the land measuring in length of 75' but the respondent no.3 has far exceeded this by raising the construction up to 81'2”. He has raised extra projection over public land.

On the report of Junior Engineer, the Municipal Board issued a notice to the respondent no.3 on 8th November,2002 u/ss. 170

(11), 194 and 203(2) of the Rajasthan Municipalities Act, 1959(for short "the Act of 1959") mentioning therein that he has raised unauthorised construction of basement, first floor and second floor as also he has made encroachment upon on the public land on the southern side directing him to remove the unauthorised construction and submit compliance report within 3 days, failing which the Board would be constrained to remove such unauthorised construction u/s 254 of the Act of 1959. But, since the respondent no.3 is husband of one of the Member of the Municipal Board namely, Smt. Shanti Sankhla, no action was taken in the matter . On the contrary, the Executive Engineer and Junior Engineer of the Board again inspected the disputed site on 26th November,2002. Purpose for this fresh inspection was to work out the cost of unauthorised construction. This time the Junior Engineer reported that total measurement of unauthorised construction of the basement was 299.91 square ft. and cost of which construction was estimated @ Rs.3220/- per square meter. Similarly, unauthorized construction on the first floor was measured to be 427.46 square ft. and cost of which was construction was estimated @ Rs.2470/- per square meter. The measurement of unauthorised construction on the second floor was 427.46 square ft. and cost of which construction was estimated @ Rs.2585/- per square meter. Thus, the total cost of unauthorized construction was valued at Rs.31,26,520/-. According to this report, since the construction was finished up to only 40% and remaining was still unfinished and thus the total cost of finished construction was assessed as Rs.12,50,608/-.

The Settlement Committee of the Board in its meeting held

on 30.11.2002 in compounding the offences of the respondent no.3 u/ss. 171, 194 and 203(2) of the Act of 1959 realized a simple amount of 1% of Rs.12,50,608/- which came to Rs.12,506/-. Amount of conversion charges for unauthorized construction was determined as Rs.27800/-. According to the petitioner, Rule (4) of the Rules of 2000 provides that a person seeking permission for its conversion of land from residential to commercial has to pay 40% of the amount of Reserved Residential Cost. Further, for every other construction namely, basement, first floor and second floor, he is required to pay additional 10% of the cost of land. Previously, the petitioner paid conversion charges of the ground floor for the land of 190 square meters and deposited only a sum of Rs.91,200/- as conversion charges. Neither area of construction nor the charges of conversion has been correctly calculated. It has been argued that Rules of 1966 provides for compounding of offences but has excluded the offences u;/s 165(4), 94 and 203. Alternatively, it has been submitted that Settlement Committee of the Board has regularised unauthorised construction of the respondent no.3 by charging a very meager amount of Rs.12,506/-. According to the petitioner, instead of charging 1% of the cost of unauthorized construction as compounding fee, the Board ought to have realized 25% of such cost which amount according to the petitioner would have been around Rs.7,80,000/- and further amount of compensation could have been charged in accordance with the Rules of 1966. Thus, the functionaries of the Board caused a loss of Rs.10 lacs to the its coffers. The petitioner has stated that she also filed a civil suit in the Court of Civil Judge(J.D.) and Judicial Magistrate, Sujangarh with an application for interim injunction for restraining the respondent no. 3 from

raising unauthorised construction and for protecting her easementary rights of light and air. The petitioner in the petition thus has prayed that the order Annexure 9 whereby the Settlement Committee of the Board decided to compound the unauthorized construction raised by respondent no. 3 should be set aside and a probe should be ordered with regard to compounding of such huge unauthorized constructions and conversion of land use from residential to commercial.

During the pendency of the aforesaid petition, the petitioner filed another writ petition in regard to the same property against the sale of portion of road described as `strip' over which encroachment was made by the respondent no.3 and challenged the sale-deed executed in favour of the respondent no.3 by the Board on 17th April, 2003 with the prayer that the same be declared as void ab-initio and quashed and set aside. In this writ petition, the petitioner has alleged that when this Court was already seized of the matter in the earlier writ petition and had passed an interim order to the effect that third respondent shall not transfer, alienate or part with the possession of the property in question and further construction, if any, shall be at his risk and cost , the respondent has tried to over reach the process of the Court by selling off the land . It was stated that the sale of this land which was part of public road described as “strip land” was based on the resolution passed by the Board on 11th March,2003. It has been submitted that this action of the respondent was intended to cover up their earlier illegalities when they allowed compounding of unauthorized construction and regularised the same by charging a meager amount even though part of it was raised over

encroached portion of the public road and now again the land which is part of the National Highway No.65 has been sold out to the respondent no. 3 in flagrant violation of mandatory provisions of law as also interim order passed by this Court on 27.2.2003. Entire proceedings to sell out the disputed land in the name of “strip” were hurriedly carried out before a decision was rendered by this Court in the pending petition. It has been submitted that according to proviso (i) to Section 80(1) of the Act of 1959 no such lease, sale, transfer and contract shall be binding on a Board unless it is in conformity with the provisions of the Act and the Rules. In view of the provisions contained in Rule 23 of the Rajasthan Municipalities (Disposal of Urban Land) Rules, 1974 (for short “the Rules of 1974”) no strip of land can be sold if it endangers public safety or is against traffic regulation. According to Rule 22 of the Rules of 1974 the lands vesting in and belonging to the Board shall be reserved in the public interest and these lands have been indicated in the said Rule as lands laying within 100 feet on both sides from centre line of any national highway when passing through the municipal limits and land laying within 50 feet on both sides from centre line of any State highway falling within the municipalities . Sub-rule(2) of Rule 22 supra categorically place a restriction on sale of such land by providing that such land shall neither be sold, leased or otherwise transferred nor shall be let out to any person by Board. It has been further stated that the plot of the petitioner is situated adjacent to the disputed land. The petitioner as well as the respondent no. 3 were granted lease for a period of 99 years by the Board and therefore western side of the plot of respondent no. 3 automatically becomes eastern boundary of the petitioner's plot. In the allotment letters issued to

both of them, this boundary length has been shown as 77'7". The sale of land as 'strip land' regularizing the illegal construction of the respondent no. 3 made up to the length of 82'7" would extend the length of his plot by 5' and the building line of the road would thereby be disturbed. According to the petitioner this would violate the proviso (3)to Rule 23 of the Rules of 1974, clause (iii) of the explanation given where under provides that no strip of land shall be sold until a building line is established. The action of the respondents according to the petitioner was in contravention of mandate of Article 14 of the Constitution of India and constituted a case of malice in law being abuse of the power and fraud on power which can only be termed as mala fide exercise of power .

These petitions have been contested by both, Municipal Board, Sujangarh as also the respondent no.3. In reply to the writ petition No.746/03 jointly filed on behalf of the State of Rajasthan, Director, Local Bodies Department and Municipal Board, Sujangarh, a preliminary objection has been taken with regard to the maintainability of the present writ petition as a Public Interest Litigation at the instance of petitioner Smt.Sunita Sharma. It has been stated that petitioner has filed a civil suit for violation of her easementary rights on account of the construction raised on the disputed site. The petitioner's bona fides has further been questioned by stating that she herself has violated the municipal laws and constructed a show-room in the name of `Krishna Motors' by making encroachment on the public road. It has been stated that there was no illegality and irregularity in selling `strip of land' and regularizing construction of the respondent no. 3 . It has been submitted that before

allowing conversion of land and selling strip of land, public notices were given and objections were invited. No objections however were received. Construction raised by the respondent no.3 was regularized after receiving requisite charges and strip of land has been sold to him on receiving sale consideration. He has denied that construction raised by respondent no. 3 has exceeded existing building line. Application of the respondent no. 3 for compounding of the unauthorized construction was duly considered by the Settlement Committee constituted under the Rules of 1966 and the said Committee after due application of mind decided to regularize the said construction on payment of requisite charges. The respondent no. 3 has since deposited the conversion charges and has also paid the compounding charges. Strip of land has been sold to the respondent no.3 on sale consideration arrived at on the basis of market price of the land. It has been stated that filing of the present petitions is an abuse of the process of Public Interest Litigation.

Respondent no. 3 has filed separate replies to these writ petitions in which he has questioned the maintainability of the present petitions at the instance of Smt. Sunita Sharma. It has been stated that a Public Interest Litigation can be filed and maintained only if there is a complete violation of constitutional or statutory provisions by the State. It is essentially meant to protect basic human rights. It has been stated that the petitioner was already engaged in litigation with the respondent no.3 and a civil suit filed against him by the petitioner was pending before the Court. The petitioner herself was guilty of encroachment on the land of public road. So far as the alleged encroachment made by respondent no.

3 is concerned, this was only a patch of land which has been sold out to him on payment of a huge price of Rs.1,90,600/- @ 8000/- per square meter. This was a strip of land measuring 22.25 sq. meter and was “Khancha” land lying in between the plots of the petitioner and the respondent no.3. It was denied that the municipal authorities were in connivance with the respondent no.3.

We have heard Mr.Bheem Arora, learned counsel for the petitioner, Mr.K.N.Joshi, learned counsel for the Board, Mr.M.R.Singhvi, learned counsel for respondent no.3 and Mr.Rameshwar Dave, learned Dy.Government Advocate for the State.

Mr.M.R.Singhvi, learned counsel for the respondent no. 3 has cited before us a number of judgments namely, (1) R & M Trust vs. Koramangala Residents Vigilance Group & Ors., reported in (2005) 3 SCC p.91, (2) Williamson (Assam) Ltd. vs. Commissioner of Income Tax, Guwahati, reported in (2005) 7 SCC p.541, (3) Dr..B.Singh vs. Union of India & Ors., reported in (2004) 3 SCC p.363, (4) Roop Chand Adlakha & Ors. vs. Delhi Development Authority & Ors., reported in AIR 1989 S.C. p.307 and (5) State of Orissa vs.Dr.(Miss) Binapani Dei & Ors., reported in AIR 1967 S.C. p. 1269. With the help of these judgments, he has argued that the jurisdiction of public interest litigation is meant for the purpose of coming to the rescue of the downtrodden and this sacrosanct jurisdiction should be invoked very sparingly and in favour of a vigilant litigant and not for the persons who invoke this jurisdiction for the sake of publicity or for the purpose of serving their private ends.

We need not examine maintainability of the writ petition in the light of various judgments cited at the bar because the controversy raised in the present matter has during the course of arguments been narrowed down in a short compass as to whether the Board has taken correct measurements in calculating the area of unauthorized construction and has calculated the amount of compounding charges on correct rate under the relevant provisions of the Rules of 1966 and whether the sale of strip of land measuring 22.25 sq. meter to the respondent no. 3 was legally permissible.

Mr. Bheem Arora, learned counsel for the petitioner apart from reiterating the arguments enumerated above has alternatively argued that even if strip of land sold to the respondent no. 3 fall within the building line, the respondents have not correctly calculated the compounding charges. According to him the case of respondent no. 3 should fall under clause (v) of Rule 4(2) of the Rules of 1966 whereunder unauthorized construction which offend against bye-laws and which were continued in spite of prohibitory notice to stop construction may be compounded at the request of the party and compensation in such cases shall not be less than 33-1/3% of the cost of unauthorised constructions. He has argued that the respondents have not made correct calculations of the construction made on the ground floor, first floor and second floor. While the construction of 20 shops on the ground floor would in any case exceeds 2000 sq. ft., the respondents Board in compounding the unauthorized construction in the basement , first floor and second floor

was more than generous in taking measurement of first constructions. The measurement of basement has been taken as 299.91 sq. ft. and on the first and second floor has been taken each as 427.46 sq. ft. and in making calculation of the compounding charges also, a further leverage has been given to the respondent no.3 by charging only 40% of the construction price on the pretext that remaining 60% was only unfinished work.

On the other hand, learned counsel for the respondent -Board and the respondent no.3 have argued that the measurements have been correctly taken and calculations have been correctly made according to clause (i) of Rule 4(2) of the Rules of 1966 whereunder the constructions put up after obtaining sanction but in which minor deviations have been made from the sanctioned plan and such deviations do not contravene any bye-law, policy or resolution of the board, can be compounded if the party concerned makes an application along with sanctioned plans within one month requesting that such deviations should be sanctioned and regularised.

On a query made by the Court, learned counsel representing the Board and the respondent no.3 stated that no bye-laws of construction were in existence for the respondent Board. Even in cases of such municipalities where there are no provisions or bye-laws, Section 170 of the Act of 1959 would govern the field. Sub-section (1) of Section 170 provides that a person intending to erect a new building or new part of a building, shall give notice of his intention to the Board. Sub-section (4) of Section 170 provides that where a bye-law has been made prescribing

and requiring any information and plans in addition to a notice, no notice under sub-section (1) shall be considered to be valid until the information and plans, if any, required by such bye-law have been furnished to the satisfaction of the board. Sub-section (5) of Section 170 provides that where no such bye law has been made, the board may within a fortnight of the receipt of the notice under sub-section(1) require the person who has given such notice to furnish a plan and specification of any existing or proposed building or part of a building or well together with a site plan of the land with such reasonable details as the board may specify in its requisition. Sub-section (6) of Section 170 further provides that save as otherwise provided in the Act or the rules or bye-laws thereunder, the board may- (a) give permission to execute any work of which notice has been given under sub-section(1) and (b) impose in writing conditions is accordance with the Act and bye-laws thereunder as to level, drainage, sanitation, design, materials and cubical capacity of rooms, doors, windows and apertures for ventilation or as to the number of storeys to be erected or with reference to the location of the building in relation to any existing building or existing street or as to the purpose for which the building is to be used. Sub-section(8) of Section 170 provides that should the board neglect or omit for one month after the receipt of a valid notice under sub-section(1) or after the receipt of further particulars demanded under clause (b) of sub-section(7), to make and deliver to the person who has given such notice an order of the nature specified in sub-section(6), such person may by a written communication call the attention of the board , if such omission or neglect continues for a further period of 15 days from date of such communication, the board shall be deemed to

have sanctioned the proposed work.

It is admitted position that there are no bye-laws on the subject and therefore, the constructions would be regulated as per the order of permission granted by the Board under sub-Section(6) of Section 170. In the present case, admittedly, the respondent Board granted permission for construction to respondent no. 3 by order of permission dated 8.3.2002 though as many as 11 conditions were imposed therein. Condition no. 11 was that the construction should be made leaving 42 ft. open land from the centre of the road in front of his land and such permission was granted for construction of only 20 shops on ground floor as per the approved plan. The inspection report of the Junior Engineer dated 2.11.2002 reveals that respondent no.3 had raised construction on the basement, first floor and second floor as against the permission granted for raising construction of 20 shops on the ground floor. Not only this, he did not leave 40" land in front of his plot from the centre of the road. He persisted in making construction even after receipt of notice dated 8.11.2002 issued u/ss. 203 read with Section 170(11) and 194 of the Act of 1959. According to us, the case of the petitioner does not fall in clause (i) of Rule 4(2) of the Rules of 1966. But at the same time, we also cannot accept the contention of the counsel for the petitioner that such construction would fall in clause (v) of rule 4(2) of the Rules of 1966 because clause (v) refers to unauthorized constructions which offend against bye-laws and which were continued in spite of prohibitory notice to stop construction. No doubt, the construction was not stopped by respondent no. 3 on receipt of the prohibitory notice, but there being no

bye-laws on the subject, it would not qualify the first condition of clause (V) of Rule 4(2) of the Rules of 1966 .

In our considered opinion, the case of the respondent no. 3 would fall in clause (iii) of Rule 4(2) which refers to unauthorized constructions which do not offend against bye-laws but which were continued in spite of prohibitory notice to stop construction and such unauthorized construction may be compounded and regularised on payment of 7.5% of the cost of unauthorised construction as compensation .

This now takes us to the argument that the Board has not taken correct measurement of the unauthorised constructions for evaluating their cost and even the cost of constructions arrived at on such faulty measurement has also been substantially reduced by restricting it to only 40% of the finished work and remaining 60% was ignored altogether on the pretext being unfinished work.

We are not convinced with the argument of the respondents that the constructions which are finished on the date when such unauthorized constructions were compounded should form basis for calculating the compounding charges. In our view, while interpreting the Rules of 1966 especially its clause (iii) of Rule 4(2), the mischief which these rules seek to suppress should also be kept in view which in this case is to curb the menace of unauthorised constructions. We have to make a purposive interpretation in keeping with the intention of the rule making authority. So construed, we are clear in our mind that the

calculation of the compounding charges should be made on the basis of actual measurement of the entire unauthorized constructions. In our view, the respondent Board has been more than generous in regularizing the unauthorized constructions raised by the respondent no.3 by taking a very small portion of the entire constructed area as the basis for calculating the measurements and made mockery of the Rules of 1966 by further diluting it to the extent of only such constructions which according to it were finished and leaving out completely 60% of the unauthorized constructions.

We, therefore direct that the Superintending Engineer, Public Works Department, Churu to depute a civil engineer not below the rank of Executive Engineer to take actual measurements of the basement, first floor and second floor. On the basis of such measurements furnished by the Executive Engineer to the respondent Board, the Board shall undertake the exercise of calculating compounding charges @ Rs.7.5% of the entire unauthorised constructions made on the basement, first floor and second floor on the basis of rates mentioned in its proceedings dated 27.2.2002(Annexure 8 to writ petition no. 746/03). The respondent no. 3 shall be required to pay the sum so arrived minus an amount of Rs.12,506/- already paid as compounding charges to the respondent Board. The Superintending Engineer, P.W.D. Churu shall undertake the exercise of taking measurements of the said unauthorised constructions within a period of one month from the date of receipt of copy of this order and the respondent Board shall issue a demand notice to the respondent no. 3 within 15 days of the receipt of such calculations from the Executive Engineer. The respondent no. 3 would make payment of

the sum demanded from him by the Board within a period of 15 days from the date of receipt of the demand notice failing which the respondent Board would be free to take steps for demolition of the unauthorized construction in accordance with the provisions contained in sub-section (11) of Section 170 of the Act of 1959.

In so far as the sale of the strip of land is concerned, we with the assistance of the learned counsel for the parties perused site plan of the area in question which has been produced by the respondent-Board under attesting signatures of its Executive Officer as Annexure R/3 with their reply in writ petition No.746/03. According to this site plan, the building in dispute for which permission of construction was granted to the petitioner has been constructed on corner plot of a circle. Adjacent plot of the petitioner is shown extended towards the road marked as “G” . While leading towards the west from the side of plot, the other adjacent shops/show-rooms etc. appear to fall within the building line. Even after the sale of strip of land to the respondent no.3, the building line of the road does not appear to have been violated. According to Rule 23 of the Rules of 1974 the piece of land adjoining an existing plot which cannot be put to independent use and which does not exceed 100 sq. yds. can be sold as strip of land if the building line is not deviated. In the present case, size of the strip of land is 22.25 sq. meter which converted into yards comes to only 24.33 sq. yards. In the facts of the present case, when the respondent-Board after inviting objections from general public has by unanimous vote resolved in favour of selling the strip of land, we are not inclined to make any interference with their decision.

Let a copy of this judgment be sent to Superintending Engineer, Public Works Department, Government of Rajasthan, Churu for compliance.

With the aforementioned directions, both the writ petitions are disposed of. There shall be no order as to costs.

(MOHAMMAD RAFIQ),J. **(S.N.JHA),C.J.**